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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 3

ROBERT REDRUP, *Petitioner,*

vs.

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent.*

ON WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

No. 16

WILLIAM L. AUSTIN, *Petitioner,*

vs

COMMONWEALTH OF KENTUCKY, *Respondent.*

ON WRIT OF CERTIORARI TO THE MCCRACKEN CIRCUIT COURT OF MCCRACKEN COUNTY, COMMONWEALTH OF KENTUCKY

BRIEF *AMICUS CURIAE* OF THE COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INC.

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BRIEF *AMICUS CURIAE* OF THE COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INC.

STATEMENT

This brief *amicus curiae* is submitted on behalf of the Council for Periodical Distributors Associations, Inc. ("CPDA"), with the consent of all parties to these actions, in support of petitioners' appeals.

INTEREST OF THE *AMICUS CURIAE*

CPDA is a national trade association of more than 700 local independent wholesalers of magazines and paperback books. For the most part, the members of CPDA distribute all leading magazines (for example, *Time, Life, Look, Saturday Review of Literature, TV Guide* and *Family Circle*) and all leading lines of paperback books (for example, Pocket Books, Bantam Books, Dell and New American Library). The majority of magazines and paperback books sold in retail outlets in the nation are distributed by CPDA members. Because of the economics of distribution, there are many communities in which there is only one paperback book and magazine wholesaler, and there are many retail outlets whose sole source of such products is a local wholesaler.

These two criminal actions involve the question of the circumstances under which "knowledge" of the obscenity of a publication may be imputed to a wholesaler or retailer who had no role in the publication, had no knowledge of the publication's contents, had no reason to know that the publication was obscene, and believed, in good faith, that he was selling constitutionally protected non-obscene literature.

The members of CPDA are vitally interested in the outcome of these prosecutions because it is they, and their retail customers, who will be the victims of any holding which permits an obscenity prosecutor to prove scienter when the only evidence is (a) that an obscene publication was sold; and (b) that the seller knew that the publication dealt with sex and was frowned upon by certain segments of the community. It is the members of CPDA, and their retail customers, who must take the law laid down in these cases, weigh the dangers and expenses involved, and decide whether to distribute material dealing with sex or capitulate completely to public and private censors. If guilty "knowledge" can be imputed

under the facts of these cases, wholesalers and retailers are likely to refuse to handle any publication which touches upon sex and which offends any pressure group or public official. And when this happens, the public will be denied access to constitutionally protected literature.

As small businessmen who tend to live in the community in which they distribute, who object to the distribution of obscenity, and who are concerned with the image of the publishing industry, the members of CPDA seek a determination in these actions which will enable law enforcement officials to stop the calculated purveyance of obscenity without impeding the distribution of constitutionally protected literature. We submit this brief in the hope that it will aid the Court in this task.

THE ACTIONS

The pertinent facts are presented in the petitioners' briefs and need not be repeated here. Simply stated, the issue in the *Redrup* case (No. 3) is whether "knowledge" of obscenity can be imputed to a retail clerk who was completely unfamiliar with the books in question, who did not regularly work in the retail outlet where the sale was made, but who failed to contest an arresting officer's statement that a book was "garbage".

In the *Austin* case (No. 16) the issues are (a) whether a state statute may require "knowledge" to be presumed from a finding of obscenity and sale, and (b) whether a defendant may be denied the opportunity to prove that he, in fact, had no guilty knowledge, took reasonable steps to insure that he did not sell obscene literature, and believed, in good faith, and on rational grounds, that he was selling only constitutionally protected non-obscene literature.

The cases are similar in that they seem to raise the question, not specifically answered in *Smith* v. *California*, 361 U. S. 147 (1959), of the circumstances under which guilty "knowledge" can be imputed. It is our position that this question need not be answered on the facts of these cases. However, we consider this matter of such prime importance that we will first attempt to formulate criteria for scienter which would prevent obscenity peddlers from evading the law by closing their eyes, and would achieve this result without the collateral effect of rendering the scienter requirement of *Smith* meaningless. To paraphrase MR. JUSTICE FRANKFURTER, we will attempt to formulate a standard which will enable law enforcement officials to roast the pig without burning down the house. *Butler* v. *Michigan*, 352 U. S. 380, 383 (1957).

The cases are also similar in that the state in each case seeks a holding which would, in effect, overrule *Smith*. If New York proved scienter in *Redrup*, any state can prove scienter by merely establishing that the defendant sold the publication and knew that there were groups which considered the publication to be "garbage". If Kentucky proved scienter in *Austin*, any state can do the same by enacting a similar presumption statute and by similarly denying a defendant the opportunity to prove lack of guilty knowledge. To impute "knowledge" under such circumstances is to reduce the issue of scienter to a mere formality on which the state must always prevail.

Thus, each case could be fully and fairly decided by holding that, on the records below, there is no satisfactory proof of scienter. The final portions of this brief will discuss the insufficient proof of scienter in each of the actions.

POINT I.

UNDER THE FIRST AND FOURTEENTH AMENDMENTS GUILTY "KNOWLEDGE" MAY NOT BE IMPUTED TO A SELLER WHO LACKS KNOWLEDGE OF THE PUBLICATION'S CONTENTS AND BELIEVES, IN GOOD FAITH, AND ON RATIONAL GROUNDS, THAT THE PUBLICATION IS NOT OBSCENE.

A. Suggested Criteria for Determining Scienter

If erosion of the right of free speech is to be avoided, criteria for determining scienter must take cognizance of the economic realities of distribution in the publishing industry. To protect First Amendment freedoms, such criteria should be formulated in light of the facts (a) that distributors are under great pressure from public and private censors to suppress virtually all publications dealing with sex (see Lockhart and McClure, "Censorship of Obscenity: The Developing Constitutional Standards", 45 Minn. L. Rev. 5, 6-13 (1960)), (b) that it is economically impossible for distributors to read the thousands of publications which they handle, many of which are dated and must be put on the stands almost as soon as they are received, (c) that most distributors are small businessmen who cannot afford to retain lawyers to advise them on obscenity questions, and (d) that since there is no litmus test for obscenity, there are many instances in which attorneys will not be able to render a reliable opinion on the question of whether a particular publication is obscene. Such criteria must also recognize that wholesalers and retailers are in business to make a living, not constitutional history by proving, at their peril, that a particular publication is not obscene; few (if any) distributors are willing to risk freedom, livelihood and reputation in the hope that this Court will ultimately hold a publication to be non-obscene.

If the criteria for establishing scienter ignore these factors, they "must inevitably result in suppressing protected speech" since they will cause wholesalers and retailers to refrain from handling constitutionally protected material. *Speiser* v. *Randall*, 357 U. S. 513, 529 (1958); see *Smith* v. *California*, 361 U. S. 147 (1959); *Marcus* v. *Search Warrant*, 367 U. S. 717, 731-733 (1961); *Winters* v. *New York*, 333 U. S. 507, 517-520 (1948).

We respectfully suggest that the following standard, which recognizes these factors, would enable law enforcement officers to prevent the calculated purveyance of obscenity without undermining the First and Fourteenth Amendments:

> Guilty "knowledge" of obscenity cannot be imputed to a seller who lacks knowledge of the publication's contents and believes, in good faith, and on rational grounds, that the publication is not obscene.

As this standard is formulated for use in criminal actions concerning First Amendment freedoms, the burden of proof on the issue of scienter must, of course, be the prosecutor's. *Speiser* v. *Randall*, 357 U. S. 513 (1958); *Freedman* v. *Maryland*, 380 U. S. 51, 58 (1965); *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478, 491-495 (1962).

On the facts before this Court, it is unnecessary to consider in detail the type of evidence which might establish lack of good faith or absence of rational ground for belief that a publication is not obscene. Threats and charges by private vigilante groups would not be sufficient and should be considered irrelevant since such groups are perpetually objecting to the sale of constitutionally protected literature. See Lockhart and McClure, "Censorship of Obscenity: The Developing Constitutional Standards", 45 Minn. L. Rev. 5, 6-13 (1960). Similarly, threats by state officials

should not be sufficient as such threats are frequently irresponsible and may well be unconstitutional. *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963).

Evidence which could be used by a state in attempting to prove scienter against a distributor might include knowledge by the defendant that the publication had been previously adjudged obscene by a court, knowledge by the defendant that the publisher had been convicted for publishing obscene literature of a similar type, prior conviction of the defendant for selling similar publications, participation by the defendant in the publishing of the items in question (see *Mishkin* v. *New York*, 383 U. S. 502 (1966)), and promotional activities by the defendant which stress the prurient nature of the publication (see *Ginzburg* v. *United States*, 383 U. S. 463 (1966)).

B. The Lack of Scienter in Each Action

Applied to the cases at bar, the standard suggested above establishes that there was no scienter in either action. Neither defendant knew the contents of the publications in question (*Redrup* Record, p. 16; *Austin* Record p. 38).

There is no evidence that petitioner Redrup had reason to know that the books he sold were illegal. To the extent that the *Redrup* record has any evidence concerning scienter, it demonstrates that the defendant believed that his occasional work at the newsstand and the sale of his employer's product was fully legal (*Redrup* Record, pp. 14-21).

Petitioner *Austin* took reasonable and suitable steps to insure that none of the 11,000 titles in his book store would be obscene. The record on his appeal demonstrates that no one ever suggested to him that any of his products were obscene, and that he believed, and had every reason to believe, that he was handling constitutionally protected literature exclusively. (*Austin* Record, pp. 28-38, 49-50; see pp. 12-14 below).

Moreover, if prior to the sales in question, petitioners Redrup and Austin had retained attorneys to advise them whether the publications here involved were obscene, it is far more likely than not that these attorneys, after studying the reported cases, would have rendered the opinion that petitioners had a constitutional right to sell each of these publications. *E.g., Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478 (1962); *Jacobellis* v. *Ohio,* 378 U. S. 184 (1964); *Sunshine Book Co.* v. *Summerfield,* 355 U. S. 372 (1958), reversing 249 F. 2d 114 (D. C. Cir. 1957); *Grove Press, Inc.* v. *Gerstein,* 378 U. S. 577 (1964), reversing 156 So. 2d 537 (Fla. Dist. Ct. App. 1963); *People* v. *Richmond County News, Inc.,* 9 N. Y. 2d 578 (1961).

POINT II

THERE IS NO PROOF OF SCIENTER IN *REDRUP*.

No matter what criteria are used for determining whether "knowledge" of obscenity can be imputed, there can be no finding, consistent with the First Amendment (or with common sense), that petitioner Redrup is chargeable with knowledge of the contents of the publications he sold. It is hard to imagine a seller who could have less knowledge or a record on which there is less basis for imputing knowledge.

Redrup was a $75 a week clerk who did not normally work in the outlet where the sale was made. (12, 14-15)* The outlet sold newspapers, leading news and general interest magazines, sports magazines, racing magazines, "girlie" magazines and paperback books (20-21). Redrup did not order the books in question; he did not read them; he had never even seen them (16). All he knew was that a police-

*All references in Point II are to the record in *Redrup*.

man ordered two books by title (10-11), and that it was his duty, as an employee, to sell the products of the newsstand.

If this is sufficient to establish scienter and make Redrup a criminal, it becomes very hazardous to work in establishments which sell books dealing with sex.

There is, in fact, no scienter requirement if scienter is established by showing merely a sale and acquiescence in a policeman's statement that a publication is "garbage". (Interestingly enough the policeman made no note of his alleged conversation with Redrup and did not refer to it in his complaint, although it was his practice to make written notes of such conversations [12-13]; Redrup denied any such conversation [16].) After all, many publications which are "garbage" in the eyes of the police are constitutionally protected. (See the cases cited at page 8 above.) If the New York District Attorney proved scienter on the *Redrup* record, there is probably no case in which scienter cannot be proved. The scienter requirement laid down in *Smith* v. *California* then becomes an easily evaded fiction, and *Smith* is effectively overruled.

POINT III

THERE IS NO PROOF OF SCIENTER IN *AUSTIN*.

A. Section 436.100 of the Kentucky Revised Statutes Is Unconstitutional On Its Face and as Applied to Petitioner Austin.

Petitioner Austin was convicted and sentenced under Section 436.100 of the Kentucky Revised Statutes. This statute provides, in pertinent part, that the sale of obscene printed material "shall be prima facie evidence that the seller . . . had knowledge of the obscene character of the

printed matter. . . ." (The full text of the statute is set out in the Appendix hereto.)

Section 436.100 is unconstitutional for at least three reasons. First, under the Fourteenth Amendment, for a state to prove a criminal case through the use of an evidentiary presumption, there must be, at a minimum, a logical nexus between the fact proved and the fact to be presumed. *E.g., Tot* v. *United States,* 319 U. S. 463 (1943); *Western & Atl. R. R.* v. *Henderson,* 279 U. S. 639 (1929). There is no such nexus in *Austin.*

When, as here, a man, who is engaged in other enterprises, owns a book store (in which he spends little time), and takes reasonable steps to insure that his store will not handle obscene publications (28-39, 49-50)*, it is completely unreasonable to presume that he knew of the allegedly obscene character of two magazines (out of 11,000 titles) which he never saw and did not know he was distributing (30, 38). If scienter can be presumed under such circumstances, there is, in effect, no scienter requirement, *Smith* v. *California* notwithstanding.

Second, the presumption is unconstitutional because, as in *Speiser* v. *Randall,* 357 U. S. 513 (1958), it shifts the burden of proof to the defendant on a question involving First Amendment freedoms, and thereby impairs these freedoms. If a bookseller knows that he will have the burden of proving lack of scienter in a criminal obscenity action, he will be reluctant to handle materials dealing with sex. The results will be that a great deal of constitutionally protected literature will not be offered for sale and the freedoms guaranteed by the First Amendment will be effectively undermined. The language of MR. JUSTICE BRENNAN in *Speiser* v. *Randall, supra,* is fully applicable here:

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*Unless otherwise indicated, references in Point III are to the record in *Austin.*

". . . The separation of legitimate from illegitimate speech calls for more sensitive tools than California has supplied. In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome. . . . Where the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the State bear the burden of persuasion to show that the appellants engaged in criminal speech. Cf. *Kingsley Books, Inc.*, v. *Brown, supra.*

"The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, cf. *Dennis* v. *United States, supra,* provide but shifting sands on which the litigant must maintain his position. How can a claimant whose declaration is rejected possibly sustain the burden of proving the negative of these complex factual elements? In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free. 'It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of

escape from constitutional restrictions.' *Bailey* v. *Alabama*, 219 U. S. 219, 239." (357 U. S. at 525-526).

See also *Freedman* v. *Maryland*, 380 U. S. 51, 58 (1965); *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478, 491-495 (1962).

Third, since under the Kentucky statute a defendant can only prove lack of scienter by taking the stand in a criminal action brought against him, the statutory presumption effectively denies him his Fifth and Fourteenth Amendment right to remain silent. *Griffin* v. *California*, 380 U. S. 609 (1965); *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964).

B. Petitioner Austin Was Not Permitted to Prove Lack of Scienter.

Petitioner Austin was not permitted to establish, as a defense, that there was no scienter. Evidence that he wrote to the publisher of the magazines in question that it should "never under any circumstances, ship us any publications that does (sic) not have a second class permit" was kept from the jury (33-34).*

Similarly, the trial court would not permit testimony (a) that Austin believed that the magazines in question had second class mailing privileges (32), or (b) that his warehouse foreman was instructed to withhold from distribution any magazine which lacked such privileges (49-50). (Obscene magazines cannot receive second class mailing privileges. 18 U. S. C. A. §§ 1461, 1463; 74 Stat. 654, 655, 666 (1960), 39 U. S. C. A. §§ 4001, 4006, 4354.)

*This letter was marked as an exhibit for identification at the Circuit Court trial (34). For some inexplicable reason, it has not been printed as part of the record to this Court. We understand that this letter, which is an essential part of the record below, will be made available to the Court.

Moreover, testimony was excluded which would have established that it was not possible to check all of the publications placed on sale (30-31, 50).

In addition, Austin was not permitted to prove the contemporary community standards by which he could judge the question of a publication's obscenity or non-obscenity. See, for example, the definition of obscenity in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General,* 383 U. S. 413, 418 (1966). The record indicates that proof of such standards would have demonstrated a good faith belief that the publications at issue did not exceed community mores and were not obscene (37, 53-58, 60-65).

In depriving Austin of an opportunity to prove his defense of no scienter, the courts below denied him a fair trial in violation of the Fourteenth Amendment. *E.g., Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673 (1930); *Saunders* v. *Shaw,* 244 U. S. 317 (1917).

The harm caused the defendant by these erroneous evidentiary rulings was aggravated by the fact that he was being tried under a statute which presumes scienter. Obviously, there is no genuine scienter requirement when scienter is presumed and the defendant is not permitted to rebut the presumption.

C. The Jury Was Permitted to Find Petitioner Austin Guilty Even if He Established That He Believed, in Good Faith, That the Publications Were Not Obscene.

Notwithstanding a very clear request by Austin's attorney, the trial court refused to instruct the jury that it must acquit if it found that the defendant believed, in good faith, that the publications were not obscene (100-101, 109-111). This, by itself, is reversible error for

the simple reason that such a good faith belief is the very opposite of guilty knowledge. By denying this request, the instructions of the court, in direct contravention of the holding in *Smith* v. *California,* allowed a conviction in the absence of scienter.

D. There is No Evidence Which Could Support a Finding of Scienter.

The only evidence which has any conceivable bearing on the question of Austin's mental state is testimony that, in response to pressures exerted by a vigilante group, Austin had certain "girlie" magazines (including the two magazines here involved) stapled so that they could not be read in the store, placed these magazines behind the counter, and refused to sell them to persons under the age of twenty-one (21-26, 33-35, 41, 46-47). Guilty "knowledge" of obscenity cannot be found from this evidence.

Austin's steps to restrict the availability of these magazines were not taken in response to a suggestion that the magazines were obscene or illegal. The vigilantes whom he was trying to placate claimed only that some unspecified "girlie" magazines might be harmful to minors. The vigilantes did not seek complete suppression of all "girlie" magazines; they sought only to restrict distribution to minors (23-26, 33-36, 41).

Moreover, if vigilante pressures are sufficient to impute "knowledge" of obscenity, there is probably no bookseller in the nation to whom such "knowledge" cannot be imputed. It is commonly known that throughout the nation well organized groups of private censors are pressuring wholesalers and retailers to refuse to handle literature dealing with sex. The targets of these groups are, for the most part, constitutionally protected non-obscene materials. See Lockhart and McClure, "Censorship of Obscenity: The

Developing Constitutional Standards", 45 Minn. L. Rev. 5, 6-13 (1960). If vigilante activities prove guilty knowledge, booksellers will be compelled to submit completely to the vigilantes, and constitutionally protected literature will be unavailable to the public. Here, again, the ruling sought by Kentucky would make *Smith* v. *California* meaningless. Indeed, as noted above (pp. 6-7) evidence of vigilante activities must be treated as completely immaterial if the scienter requirements of *Smith* are to have any effect.

The *Austin* case demonstrates the danger posed to free speech by vigilante pressures. Petitioner Austin capitulated almost completely to the private censors in his community. Should the actions of such censors be sanctioned by the courts through holdings that such actions constitute evidence of scienter, few wholesalers or retailers could stand up to vigilantes at all. The vigilantes, with the aid of the courts and prosecutors, would then have won their battle to suppress non-obscene literature dealing with sex.

Finally, even if there were evidence from which guilty knowledge could be imputed (and there is no such evidence), the restrictions upon Mr. Austin's right to prove lack of scienter (see pp 12-14 above) compel a holding that scienter was not fairly proved.

CONCLUSION

While there may be circumstances which would warrant the imputation of guilty "knowledge", those circumstances are not present in either of these appeals. If guilty "knowledge" can be imputed on the records before this Court, there is practically no obscenity action in which a state could fail to prove scienter. Thus, the question before this court is not how *Smith* v. *California* should be applied. The question is whether *Smith* v. *California*

should be effectively overruled through the sanctioning of statutory and evidentiary loopholes which would, in effect, create an absolute liability for the sale of obscenity, irrespective of the seller's knowledge or state of mind.

The judgment in each case should be reversed.

Respectfully submitted,

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APPENDIX

Kentucky Revised Statutes § 436.100

Distribution of obscene literature. (1) Where the term "person" is used in this section, it shall be taken to mean any natural person, firm, partnership, co-partnership, association, corporation or organization of any kind.

(2) Any person who, with knowledge of the contents or character, sells, lends, gives away or shows, offers to sell, lend, give away or show, has in his possession with intent to sell, lend, give away or show, or advertises in any manner or otherwise offers for sale, loan, gift or distribution any obscene book, magazine, pamphlet, newspaper, writing, picture, drawing, photograph, figure or image, or any written or printed matter of an indecent character, or who designs, copies, draws, photographs, prints, utters, publishes or in any manner manufactures or prepares any such matter or article, or who writes, prints, publishes or utters or causes to be written, printed, published or uttered any advertisement or notice of any kind giving information, directly or indirectly, stating or purporting to state, where, how, of whom or by what means any such matter or article named in this section can be purchased, obtained or had, or who employs, uses or permits any minor to do so, shall be fined not less than fifty dollars nor more than five hundred dollars, or imprisoned for not more than six months, or both so fined and imprisoned.

(3) Any person who, with knowledge of the content or character, sells, lends, gives away, shows or offers to sell, lend, give away or show any obscene printed matter, picture or figure or image to a minor, shall be fined not less than one hundred dollars nor more than five hundred dol-

lars and imprisoned for not less than ten days nor more than six months or both so fined and imprisoned.

(4) The sale, loan, gift, showing or offer to sell, loan, or the possession with intent to sell, lend, give away or show of any book, magazine, pamphlet, newspaper, writing, picture, drawing, photograph, figure or image found to be obscene, shall be prima facie evidence that the seller, lender, giver or possessor who intends to sell, had knowledge of the obscene character of the printed matter, picture, photograph or figure. (1962, c. 273, § 2; subsections (1), (3) and (4) created by 1962, c. 273, §§ 1, 3 and 4)